APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4051-55

POWELL

v.

POWELL, ET AL.

September 20, 1960

Washington, D. C.

The above-entitled matter came on for hearing on motion before The HONORABLE ALEXANDER HOLTZOFF, a United States District Judge, at 1:50 P. M.

Ruling

The Court (J. Holtzoff): The Court is of the opinion that each of the four children named in the fourth paragraph of the will took a vested remainder subject to being divested in the event that the child died prior to the death of the life tenants without issue.

And the Court will order distribution on that basis. While it is often said that no will has a twin brother nevertheless the case of Pyne versus Pyne, 81 Appeals D. C. 11, supports the construction hereby adopted by this Court.

You may submit your order.

Mr. Dulany: I only wanted to clarify whether Your Honor's ruling—I did not hear it correctly. What I want to know if I did hear it correctly. Did Your Honor say it would be divested if the child died with issue or without issue?

The Court: The child died with issue.

Mr. Dulany: With issue.

The Court: I intended to say with issue.

Mr. Dulany: I thought you said without issue and then referred to the Pyne case and I was not sure.

The Court: I am following the construction of the Pyne case.

Miss Powell: Your Honor, does that mean that if they died with or without issue?

The Court: Subject to being divested if they died with issue. Now the fact is that four of them died without issue and, therefore, their remainders are vested and not divested. And, of course, their remainders will descend either to their heirs or next of kin or devisees or the legatees as the case might be.

I notice there are other matters on the Court's list in this case. Objection to the fourth report of the auditor and a motion to strike under Rule 11. What are they?

Miss Powell: Your Honor, I believe that the other issues were in effect settled by your decision in the matter. I frankly must say that I am very—I am quite appalled that there has not been a very careful study as I asked.

The Court: Well now there is a motion under Rule 11 to strike the opposition of successor trustee and objections to the report of the successor trustee.

Now, of course, I am not going to strike any opposition. But, I will deny the motion under Rule 11 filed May 10, 1960.

Final Order Granting Motion of National Savings and Trust Company for Summary Judgment and Denying Other Motions

This cause having come on to be heard on the motion of the National Savings and Trust Company, Successor Trustee, for summary judgment, requesting the instructions of the Court with respect to the proper distribution of the trust estate created under the will of Diana Kearny Powell, deceased, and on the motion of defendant Diana Kearny Powell for summary judgment, and upon consideration of the pleadings, exhibits and memoranda of points

and authorities filed herein and of the arguments of counsel in open Court, and it appearing that there is no genuine issue as to any material fact herein, and it being the opinion of the Court that each of the five remaindermen designated in said will, namely, William Glasgow Powell, Owen Bullett Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell, received a vested remainder in one-fifth of said estate subject to being divested only by his or her death leaving descendants surviving prior to the time of distribution set forth in said will, and accordingly that as to each of said remaindermen who died prior to the time of distribution leaving no surviving descendants his or her remainder interest was not divested and now is distributable to his or her successors in interest, therefore, it is by the Court this 5th day of October, 1960.

ORDERED, as follows:

1. That the motion of the National Savings and Trust Company, Successor Trustee, for summary judgment be, and the same hereby is granted.

2. That the motion of defendant Diana Kearny Powell for summary judgment be, and the same hereby is denied.

3. That the National Savings and Trust Company, Successor Trustee, shall file its final account herein, showing distribution of said trust estate, after payment of its commissions and costs and a reasonable fee to its attorneys herein to be approved by the Court, of one-fifth thereof to Diana Kearny Powell, surviving daughter of William Glasgow Powell, and one-fifth thereof to the successors in interest of each of the following, viz: Owen Bullett Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell.

4. That, for the purpose of making said distribution as aforesaid, said National Savings and Trust Company, Successor Trustee, be and it hereby is authorized and directed to sell all the assets of said trust estate, both real and personal, and convert the same into cash.

AND IT IS FURTHER ORDERED that the motion and objections of defendant Diana Kearny Powell to the fourth report of the auditor, and the motion of said defendant to strike under rule 11 be, and the same hereby are denied.

ALEXANDER HOLTZOFF
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16071

DIANA KEARNY POWELL, *Appellant*

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor Trustee, et al., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Opinion

Decided July 31, 1961

Miss Diana Kearny Powell, appellant *pro se*.

Mr. Henry H. Paige, with whom *Messrs. Arthur P. Drury*, *John M. Lynham*, and *John E. Powell* were on the brief, for appellee, National Savings and Trust Company, Successor Trustee.

Mr. Benj. W. Dulany for appellees Anne T. Ogden and Lester H. Sellers, Ancillary Executors of the Estate of Lucy Powell, deceased.

Mr. Nathan Wold entered an appearance for appellee Martha Powell Nistler and certain other appellees.

Before: WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.

In 1958 the last surviving of five life tenants of the trust estate died and the appellee trustee was required to make final distribution under a residuary trust provision contained in a will executed in 1895. Under the terms of the trust one-half of the trust income was given to each of two daughters of testatrix for life or until marriage,

> and upon the marriage or death of both daughters then *fourthly & finally* to divide the said property *absolutely and in fee*, . . . equally between my children *now* living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children *as hereinbefore specified*. (Emphasis added.)

Four of the five children of the testatrix died, without issue surviving, prior to the time of distribution. Appellant is the sole surviving child of William G. Powell, the last survivor of testatrix' five children.

The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the

testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

We hold that the will discloses an intent to vest each of the five children with an equal share of the residue "absolutely and in fee," subject only to the life estates of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

In *Pyne* v. *Pyne*, 81 U.S. App. D.C. 11, 154 F. 2d 297 (1946), we held that unless both conditions, death of the remainderman during the preceding life estate and survival of issue of the deceased remainderman are met, the remainderman has a vested interest which passes by his will or by statute as the case may be. See also *Scott* v. *Powell*, 86 U.S. App. D.C. 277, 182 F. 2d 75 (1950); *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*, 107 U.S. App. D.C. 375, 278 F. 2d 255 (1960).

It is suggested by the dissent that this view ignores the testatrix' express intention which is articulated following the vesting clause "to divide the said property *absolutely and in fee*, . . . equally among my children *now living* . . . ." We hold simply that it would take strong and unequivocal language to negate the use of these classic words of art which have accepted meaning and fixed legal consequences. Read as Judge Prettyman reads it, the second part of the sentence is not an explanation but a repudiation of the vesting clause. It should be noted that the explanation or expression of intent which follows the vesting clause, is in turn qualified by the phrase "as hereinbefore specified" which completes the circle and takes us back to the vesting language "absolutely and in fee."

It is no help in the process of searching for intent to look to unanticipated events to prove that the testatrix could not have meant what she said by the words "absolutely and in fee." Of course she had no way of knowing in 1895 that four of her five children would die without issue. But we cannot predicate our construction of the will on what happened over the 63 years intervening between the date of the will and death of the last of five vested remaindermen. Nor can we give such weight as is urged to the "blood line" argument, for if each of her children had been survived by one child those children could have freely distributed this property outside the blood line. That events did not develop as the testatrix probably thought they would does not give us freedom to construe her will now as we think she ought to have written it had she been able to peer 63 years into the future.

Affirmed.

PRETTYMAN, *Circuit Judge*, dissenting: The basic rule of the law of wills, as I understand it, is that the intention of the testator, if it can be ascertained from language in the will, governs. This means what he intended as a matter of practical reality in his own mind, in so far as his words indicate his purpose. That question is devoid of consideration of legalisms and the niceties of judicial semantic ascription.

In the case at bar the testatrix clearly stated her intention that her property was to remain in her own family, with her own descendants. In the last part of the long sentence from which the court quotes in its opinion, she wrote:

> "• • • it being my intention that [if both daughters died or married] the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified."

The purport of that emphasis upon her intention seems to me indisputable. She had in mind, and attempted to

make clear, that at the time when the division was appointed to take place, *i.e.*, when the property was rid of its incumbent trust, her property should go to her own children and their descendants, and to no one else. Since that intention is clear, that ends the matter. The property must go as intended.

The court construes the early part of the provision it quotes. It correctly applies the rules of construction. In so far as that part of the provision is concerned, and in so far as legal rules of construction are concerned, the court, I agree, is correct. The error, it seems to me, is that the court ignores the plain expression of intent in the latter part of the quoted provision. It concludes upon construction that the property should be divided into five parts and then subdivided among the legatees, assignees, or heirs at law of each of the original children. Since four of those children had no descendants, this construction means that four of the five parts go to collaterals, in-laws, or strangers; the only direct descendant of the testatrix or of any of her children gets only one-fifth. This, to my mind, is a far cry from the clear intention of the testatrix, as expressed in the simple and emphatic restatement of her intent quoted above.

This preference of a testator to keep his property in those of his own blood is a usual one. As the Court of Appeals of New York once remarked: "Of two doubtful interpretations, that favoring the blood of the testator rather than strangers will be adopted. Human nature usually so acts."[1]

The legal point I make is that a court does not apply to the language of a will rules designed to give meaning to meaningless expressions, if the court can ascertain from the will the actual intention of the testator, *i.e.*, what the testator really meant to do with his property. Only if

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[1] *In re* Rooker's Will, 248 N.Y. 361, 162 N.E. 283 (1928).

the actual intention of the testator cannot be ascertained from the four corners of the will does the law undertake to assign an artificial meaning and result to the words used. Lacking knowledge of actual intent, the courts ascribe by an abstruse system of legalisms a meaning to the will and thus, by a naked fiction, an intention to the testator.

In the learned authorities, such as the *Restatement*,[2] the phrase "judicially ascertained intent" is used, but that term means, first, what the testator had in mind, judicially ascertained from the language of the instrument. If his actual intent is clearly to be found in the will, the court so finds, and this is the judicially ascertained intent. The *Restatement* says, for example, "The dominant objective of construing a conveyance is to determine the disposition which the conveyor wanted to make."[3] The use of the phrase "judicially ascertained intent" to include a plain purpose indubitably expressed in simple words seems to me to create confusion. But the real meaning of the authorities nevertheless seems to me to be clear.

The cases cited by the court, *Pyne* v. *Pyne*,[4] *Scott* v. *Powell*,[5] and *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*,[6] do not suggest a different view. In *Pyne* v. *Pyne* we carefully pointed out:

> "The basic, always controlling, rule in the construction of wills is the intent of the testator. If that intent can be discerned in the language of the will, read, of course, in the light of the surrounding circumstances, there is an end to the matter."[7]

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[2] 3 PROPERTY § 241 (1940).

[3] *Id.*, Comment *c*.

[4] 81 U.S. App. D.C. 11, 154 F. 2d 297 (D.C. Cir. 1946).

[5] 86 U.S. App. D.C. 277, 182 F. 2d 75 (D.C. Cir. 1950).

[6] 107 U.S. App. D.C. 375, 278 F. 2d 255 (D.C. Cir. 1960).

[7] 81 U.S. App. D.C. at 14, 154 F. 2d at 300.

We searched that will for "indicia of intent" and then went on to say: "If these indicia of intent within the will be not conclusive, we must ascertain the meaning which the law attaches to the provision in controversy."[8] We found that the available "indicia of intent" and the law's construction of the terms were the same. In *Scott* v. *Powell* we meticulously searched the whole will and considered its "scheme", and thus ascertained an "evident intent that the property should go to the testatrix's descendants so long as there were any."[9] In *Episcopal Eye, Ear and Throat Hospital* v. *Goodwin*, the problem which arose sixty-three years after the will had been written was obviously not contemplated by the testatrix, and so we laboriously applied the law's rules of construction. All three of those cases were correctly decided, in my judgment. None of them applies to the case at bar. In this latter the actual intent of the testatrix is clear, and we should not belabor the matter. Her intention is all there is to the case.

I would reverse.

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[8] 81 U.S. App. D.C. at 15, 154 F. 2d at 301.

[9] 86 U.S. App. D.C. at 283, 182 F. 2d at 81.